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91-901

No. 91-101

In The

Supreme Court of the United States

October Term, 1991

MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC., a Texas Corporation, and CHAPARRAL EQUITY CORPORATION, a Texas Corporation,

Petitioners,

v.

CITY OF EL PASO, TEXAS, a Municipal Corporation, and CITY PLAN COMMISSION,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Eighth District, El Paso, Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Madero Development and Constr. Co. v. City of El Paso*, No. EP-86-CA-403, *slip op.* (W.D. Tex. Dec. 21, 1988), the United States District Court for the Western District of Texas granted the City of El Paso's motion for summary judgment dismissing Petitioners' claims as unripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (requiring, first, a final decision from the city applying its ordinance to petitioners' land and, second, a denial of just compensation to petitioners by the state court). Petitioners ignored the holdings of the District Court and refused to seek a "variance from the Zoning Board of Adjustment, the City Plan Commission, or the City Council." Slip op. at p.7.

Petitioners failed to appeal the District Court's ruling that they should seek a variance determination under Texas law and, instead, filed the instant damages action in state court. The Texas appellate court held that a variance was available to Petitioners under Texas law and that, accordingly, under state law the court was without jurisdiction until Petitioners sought a final decision from the City of El Paso.

The Texas court's decision that Madero was required to seek a final decision from the City of El Paso raises no novel issues of federal law; nor does the decision of the Texas courts in any way conflict with any other state or federal decision. There is not even a hint that the State of Texas – nor, for that matter, the City of El Paso – has acted so as to raise an important question of federal law.

LIST OF PARTIES

Respondent City of El Paso, Texas, is a municipal corporation organized under the laws of the State of Texas. Respondent City Plan Commission is a public body formed under the laws of the State of Texas and the El Paso City Code.

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Petitioners' Petition omits the relevant opinion of the United States District Court for the Western District of Texas in the case styled *Madero Development and Construction Co. v. City of El Paso*, No. EP-86-CA-403 (Dec. 21, 1988). That opinion, which is unreported, is included in Respondents' Appendix, at p.1-a. The other relevant opinion, *City of El Paso v. Madero Development*, 803 S.W.2d 396 (Tex. Ct. App. 1991), is contained in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

Petitioners have failed to allege a constitutional violation invoking the jurisdiction of this Court since the mere enactment of the City's zoning ordinance does not violate the Just Compensation Clause of the Fifth Amendment or any other section of the United States Constitution. Further, the Constitution of the State of Texas provides a compensation remedy, which Petitioners have not yet pursued.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Article I, § 17 of the Texas Constitution provides in pertinent part as follows:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . .

Pertinent provisions of the City of El Paso Ordinances and Texas Local Government Code are attached as Appendices "D" and "E" respectively, of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Respondents' Statement of Facts

Petitioner's Statement of the Case fails to specify the stage in the proceedings, both in the District Court and in subsequent proceedings, at which the Questions Presented for Review were raised or to otherwise comply with the provisions of Supreme Court Rule 14.1(h). Further, Petitioners' Statement of the Case is argumentative,

fails to cite the record below, and presents a misleading and inaccurate account of the facts regarding their litigation against the City of El Paso in the federal and state courts.

Respondents do not accept Petitioners' statement of the facts of this case and would substitute the following statement:

Petitioners in this case, Madero Development and Construction Co. and Chaparral Equity Corp., allege that the rezoning of their property by the City of El Paso to Planned Mountain Development (PMD) constituted a compensable taking.

Richard Miller purchased 100 acres on Crazy Cat Mountain in the City of El Paso in the late 1960s, (SF 929).[1] Miller obtained rezoning for 67 acres of the property from R-3 to Planned Unit Development (Def.Exh. 1; SF 957-958, 930), and received approval for two single-family residential units per acre in a development known as "Sierra Crest," (Def.Exh. 2; SF 965). The remaining 33.9 acres retained the R-3 zoning classification, (SF 283-285, 508). Subsequently, Miller built several single family residences in Sierra Crest and sold all remaining lots, (SF 971-972).

At the public hearing for Miller's rezoning, the Kern Place Association voiced opposition to the project based on environmental and safety considerations, (SF 963-964). Rolando Madero, who was employed as Miller's urban

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[1] For the purposes of this brief and in compliance with Tex. R. App. P. 74(f) (1989), the trial court records will be designated: SF – Statement of Facts; Def.Exh. – Defendant's Exhibit; Pl.Exh. – Plaintiff's Exhibit; Tr. – Transcript.

designer at the time, was aware of the neighbors' opposition to development of the property, (SF 490-491, 967). Madero purchased the remaining 33.9 acres from Miller for $200,000 in 1979, (Def.Exh. 82; SF 295). This parcel ultimately became known as Madero Hills and is the subject of this law suit.

In February of 1982, Madero sold 1.417 acres of the parcel to Jorge Angulo for development purposes, (Def.Exh. 88; SF 293). In 1984, Madero sold approximately one quarter of an acre of the property he owned in fee simple, (Def.Exh. 141; SF 293, 1262, 810). After these sales, Madero Hills currently consists of approximately 32 acres, (Def.Exh. 66; SF 1261-1265). Of that 32 acres, Miller owns 20 acres due to partial foreclosure after Madero defaulted on the purchase money mortgage loan, (Def.Exh. 86; SF 936, 937, 946).

Madero sought to subdivide the property under the R-3 zoning, resulting in preliminary approval by the City Planning Commission (CPC) of the first phase of Madero Hills in July, 1981, consisting of two single family and four duplex units on 1.87 acres of land, (Pl.Exh. 30; SF 340, 671). (Miller took no part in efforts to develop Madero Hills, (SF 671, 942, 967)). Preliminary approval of Unit One was conditioned in part on submission and approval of a drainage study, (Pl.Exh. 30).

Following a request by the CPC, Madero submitted an application for preliminary approval of a Master Plan for all of Madero Hills in November, 1981, (Pl.Exh. 32, 126; SF 344). The Master Plan proposed development of 77 lots in four phases over 33.9 acres, (Pl.Exh. 32;

Def.Exh. 126; SF 614-618, 674-675). The CPC approved the development concept in the Master Plan and granted preliminary approval to phases two through four of the plat in July, 1982, (Pl.Exh. 39, 42; SF 346, 677-679). All approvals were subject to conditions, which were standard. *Id.*

In December, 1982, the CPC gave final conditional approval to Unit One of Madero Hills, subject to subsequent approval of a geological study for the site, a street drainage plan and a grading plan, (Def.Exh. 29; SF 346-347, 682-683). Thereafter, Madero sought approval for a revised final plat, with reconfigured "panhandle" lots, (Def.Exh. 30, 152; SF 701-703, 707, 712). The CPC eventually approved a revised plat (December, 1983), subject to similar conditions as imposed on the original plat, (Def.Exh. 34, 37, 38; Pl.Exh. 55; SF 713, 714, 1391-1392).

The City Council conditionally approved Madero's Mountain Development Area (MDA) grading permit application for Unit One, following appeal from CPC approval by the Kern Place Association, in July, 1984, (Pl.Exh. 65, 77). Madero did not meet the conditions attached to the grading permit, (Pl.Exh. 84; SF 809, 1035-1036, 1316-1318). All engineering work on the project by Madero ceased following the City's conditional approval of the grading permit, (SF 808, 1316-1317).

Madero did not take further steps required by City ordinance to obtain final plat approval for Units Two, Three and Four of Madero Hills. Madero did not meet the conditions attached to the final plat for Unit One and did not record the plat with the El Paso County Clerk, as required by City subdivision regulations and state law, (SF 1391-1392, 1423-1424, 1475). On August 13, 1985, the

City notified Madero that his subdivision file for Unit One was closed officially due to inactivity for more than one year and that, pursuant to the subdivision ordinance, approval had lapsed, (Pl.Exh. 83; Def.Exh. 106, VI D.1; SF 1403-1404). Thus Petitioners by their own inaction did not even complete processing of the development application under the former ordinance no less the new ordinance under attack.

The City Council passed the PMD Ordinance on December 4, 1984,[2] (Pl.Exh. 1, Ord. No. 8226.3). The purposes of the PMD district are:

(1) to protect significant natural features of the Mountain Development Area and preserve the City's unique visual setting as part of the comprehensive plan;

(2) to provide an alternative approach to conventional flatland development by allowing transfer of residential densities through clustering of dwellings in order to preserve larger areas of open space;

(3) to minimize scarring and disturbances of the natural character of the Mountain Development Area through control of grading and cut/fill operations as defined in the Grading Ordinance;

(4) to control water runoff and soil erosion;

(5) to provide a safe means of ingress and egress for vehicular and pedestrian traffic to and within the Mountain Development Area; and

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[2] This ordinance is reprinted as Appendix D of the Petition for Writ of Certiorari.

(6) to encourage sound engineering practices related to mountain development.

On January 14, 1986, the City Council rezoned all property within the MDA to PMD, except for those properties that fell within an exemption, (Pl.Exh. 2, Ord. No. 8561). The majority of Madero Hills was zoned PMD; however, a portion of Unit One remains R-3, (SF 800-802, 811-813, 1262-1263). Madero Hills was one of several hundred properties rezoned to PMD on January 14, (SF 1351, 1255).

Under the PMD Ordinance, the density of development is related, in part, to slope of the land, (Appendix D, PMD Ord. §§ 25-24.8, -24.9, -24.10). Madero Hills has an average slope of forty-eight (48%) percent, (Pl.Exh. 90; SF 457). Under the PMD and R-3 zoning, Madero can develop up to 26 single family residential units on the property without obtaining variances, (SF 1243, 1260-1265). In addition, the PMD Ordinance authorizes, as uses permitted by right, multiple-family and duplex residential development and recreational facilities, (Appendix D, PMD Ord. § 25-24.4; SF 1185). The ordinance further authorizes by special permit other uses, such as resort lodging, retail shopping facilities and theaters, (Appendix D, PMD Ord. § 25-24.7; SF 1185). Madero did not make application for any use under the PMD regulations, nor did Madero make application for a variance or special permit to the Zoning Board of Adjustment, (SF 830-831; City's Bill of Exceptions, Exh. B, City Code §§ 2.16.010 *et seq.*, Vol. IV, Tr. 1381-1383 (Addendum B); Exh. E, Vol. IV, Tr. 1583-1588).

Instead, Madero directly filed suit in the United States District Court for the Western District of Texas, alleging that the rezoning of Madero Hills constituted a taking of their property without just compensation. In late December, 1988, the federal District Court dismissed Madero's suit as unripe. Specifically, the court ruled that Madero had failed to utilize either the variance procedures authorized by state and local laws or the state court procedures for just compensation.

Less than a month later, Madero filed essentially the same action in state court, without returning to the City to process the application under the PMD Ordinance or to seek a variance from the PMD Ordinance. Madero was successful at trial, but the judgment was reversed by the Texas Court of Appeals on grounds of ripeness.

B. Misstatements of Fact in Petitioners' Statement of the Case

In addition to omitting pertinent facts, Petitioners' Statement of the Case contains factual inaccuracies and argumentative conclusions which require a response.

1. On pages 4 and 5 of the Petition, Petitioners allege that Unit One of Madero Hills was subjected to unusual and impossible conditions. In fact, the approval of Unit One was subject only to standard development conditions, imposed by Respondents for health and safety reasons. (Pl.Exh. 30; Def.Exh. 29; SF 346-347, 682-683). Petitioners adduced no evidence at trial to prove that these conditions were either out of the ordinary or impossible to meet.

2. On page 5, Petitioners argue that the approval of Unit One was wrongfully terminated. Respondents rescinded their approval of Unit One due to Petitioners' inaction on the project for over a year and their failure to meet the conditions imposed upon that approval. Moreover, Petitioners failed to record a final plat with the El Paso County Clerk, as required by state and local law. (Pl.Exh. 84, SF 809, 1035-1036, 1316-1318, 1391-1392, 1423-1424, 1475).

3. The statement on page 6 that "[i]t was not economically feasible to subdivide Madero Hills into only eleven lots" is merely Petitioners' legal opinion. Given that Petitioners never attempted to develop their property under the PMD Ordinance, this conclusion has no basis in fact or law. (SF 830-831; City's Bill of Exceptions, Exh. B, City Code §§ 2.16.010 *et seq.*, Vol. IV. Tr. 1381-1383 (Addendum B); Exh. E, Vol. IV. Tr. 1583-1588).

4. Contrary to the misstatement on page 6, Petitioners failed to present any competent evidence of futility. The testimony of certain city council members was ruled to be incompetent evidence by the Texas Court of Appeals. Moreover, Petitioners' claim that the Zoning Board of Adjustment is powerless to grant Petitioners a variance is a legal conclusion rejected by the Texas Court of Appeals.

SUMMARY OF ARGUMENT

There are no grounds on which to accept review of the state court decision, based on the following points:

1. The Texas Court of Appeals' disposition of this case on grounds of ripeness was premised upon Article I, Section 17, of the Texas Constitution. No federal or state taking claim is mature because an adequate state compensation remedy exists under the Texas Constitution and Petitioners were free to pursue such remedy and totally failed to do so.

2. Even if the Texas Court of Appeals reached the federal ripeness issue concerning the availability of local remedies, the court correctly applied the federal ripeness doctrine.

3. Ripeness of an as applied regulatory taking claim goes to the subject matter jurisdiction of the court, both under state law and federal law. No taking claim accrues until such ripeness requirements are satisfied.

4. This case presents no occasion for the Supreme Court to reconsider the futility exception to the ripeness doctrine.

ARGUMENT

I. PETITIONERS WAIVED ANY CHALLENGE TO THE FACIAL VALIDITY OF THE REGULATIONS

Petitioners pleaded and tried this case solely as an *as applied* regulatory taking claim. Petitioners expressly waived any challenge to the *facial* validity of the Planned Mountain Development regulations as expressly acknowledged by their appellate brief:

> (1) Appellees filed this inverse condemnation action alleging, among other things, that

> the PMD Zoning Ordinance, *as applied* to Madero Hills, constituted a taking without compensation in violation of the Texas Constitution, Article 1, Section 17, and the Fifth and Fourteenth Amendments of the United States Constitution. (Petitioners' Brief to Texas Court of Appeals, June 15, 1990, page XI);
>
> (2) The trial court expressly found that the *application* of the PMD to Appellees property constituted a compensable "taking." The jury in this case also found that a "taking" had occurred. *Appellants' arguments* under this point of error concerning *a facial attack of the PMD Zoning Ordinance are not before this Court.* (emphasis supplied). Petitioners' Brief to Texas Court of Appeals, June 15, 1990, page 29).

The Texas Court of Appeals disposed of Petitioners' claim for want of subject matter jurisdiction under Article I, Section 17, of the Texas Constitution (the taking clause).

Unlike *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 398 (1926), this case does not involve issues concerning the facial or general validity of the PMD regulations or their relationship to public health and safety, as in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Such matters were conceded during trial. Consequently, the Texas Court of Appeals reviewed only an "as applied" regulatory taking claim in reaching its decision.

II. BECAUSE A STATE CONSTITUTIONAL REMEDY IS AVAILABLE, PETITIONERS' FEDERAL TAKING CLAIM HAS NOT MATURED.

In *Madero Development and Constr. Co., Inc. v. City of El Paso*, No. EP-86-CA-403, slip op. (W.D.Tex. Dec. 21, 1988) (Appendix at p.1-a), the United States District Court for the Western District of Texas granted the City of El Paso's motion for summary judgment dismissing Petitioners' claims as unripe. The court held that Madero had failed to obtain a final decision from the City applying its Planned Mountain Development Ordinance to Madero's land. The court further held that Madero had adequate state remedies available. Accordingly, both prongs of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) were applied to Madero. Instead of filing an appeal of the District Court's holding or seeking a variance from the City, Madero instead filed a damages action in state court. In the litigation that followed, the Texas Court of Appeals held, under Texas law, that a variance was available to Petitioners and, again under Texas law, that Madero's claims were unripe under Article I, Section 17, of the Texas Constitution. As with Madero's federal action, its state claim was dismissed without prejudice.

Madero failed to file an appeal of the District Court's decision which, as a matter of *federal* law, was due within 30 days after the decision. F.R.App.P. 4(a)(1). As discussed above, the Texas Court of Appeals determined, as a matter of *state* law, that Madero's claim for just compensation was premature. The state court determination as to Madero's claims under the Texas Constitution is purely a

matter of state constitutional law, unreviewable by this Court. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law."); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."); *Payton v. New York*, 445 U.S. 573, 600 (1980) ("[B]y invoking a state constitutional provision, a state court immunizes its decision from review by this Court.").

Moreover, this state court determination of its own jurisdiction does not alter the fact that Texas law provides an adequate monetary remedy in the event that state land use regulations constitute a taking. *See Samaad v. City of Dallas*, 940 F.2d 925, 935-36 (5th Cir. 1991); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *City of Abilene v. Downs*, 367 S.W.2d 153, 159 (Tex. 1963). Following this Court's ruling in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), all state courts must obviously provide monetary relief for temporary takings. *See Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991).

Because the State of Texas provides an adequate process for obtaining just compensation, there can be no taking under the Fifth Amendment unless and until the landowner has appropriately utilized the state's procedures for obtaining just compensation. *Williamson County*, 473 U.S. at 194-97. In *Williamson County*, this Court explained that the Fifth Amendment does not require that "just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for

obtaining compensation' exist at the time of taking." 473 U.S. at 194. Thus, as a matter of law, "no constitutional violation occurs until just compensation has been denied [by the state]." 473 U.S. at 194 n.13. *See also Biddison v. City of Chicago*, 921 F.2d 724, 729 (7th Cir. 1991) ("His federal claim will ripen . . . if and when Biddison is denied just compensation by the state courts."); *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991)("In the instant case, the plaintiffs have pending under Wyoming law an inverse condemnation action to recover compensation for the loss of their homes. . . . Because the plaintiffs have not yet been turned away empty-handed, it is not clear whether their property has been taken without just compensation."); *see also Suess Builders Co. v. City of Beaverton*, 295 Or. 254, 656 P.2d 306 (1982). As the District Court resolved herein, as a matter of federal law, Madero's takings claim is not ripe at this time.

The Texas Court of Appeals dismissed Madero's claims because, as a matter of state law, the trial court lacked subject matter jurisdiction. Specifically, the court held that because Madero failed to apply for a variance from the PMD Ordinance, its inverse condemnation claims are not ripe, and under Texas law ripeness goes to a court's subject matter jurisdiction. *City of El Paso v. Madero Development*, 803 S.W.2d 396, 399-400 (Tex. Ct. App. 1991).

While the court relied on certain opinions of this Court regarding the ripeness issue in inverse condemnation cases, in determining the ultimate issue of subject matter jurisdiction the court relied exclusively on Texas state opinions. Thus, in citing federal opinions, the court relied on them not as binding precedents on the state law

issue, but as guidance in the same way the court might rely on the opinion of another state court. Nothing in the opinion suggests that the Texas court dismissed Madero's cause because it "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Michigan v. Long*, 463 U.S. at 1044 (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)). *See also Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940)("It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review.")

Under principles of federalism and comity, it has long been understood that states are free to control and define the jurisdiction of their courts without interference from federal law. Even in cases where federal claims are present, federal law does not "enlarge or regulate the jurisdiction of state courts, or . . . control or affect their modes of procedure." *Howlett v. Rose*, 110 S. Ct. 2430, 2441 (1990) (quoting *Mondou v. New York, N.H.&H. R.R. Co.*, 223 U.S. 1, 56 (1912)).

III. A DEVELOPMENT APPLICATION AND FINAL DECISION ARE REQUIRED.

The decision of the Texas Court of Appeals is entirely consistent with the decisions of this Court relating to ripeness. The court correctly declined to analyze the economic effect of the City's zoning legislation on the basis

of hypothetical plans which were never presented to the City.

As appears from the record, Petitioners had no pending development application on file with the City when the Planned Mountain Development Ordinance was enacted. Petitioners never submitted any development application, much less a request for a variance or change in zoning classification, following the adoption of the PMD Ordinance. In fact, the only development application which was ever finalized on the property was for the first phase of a subdivision for approximately three percent of the development site. Even this approval lapsed for the Petitioners' failure to satisfy reasonable conditions prior to the rezoning.

The court did not rely upon this ground, however, in disposing of Petitioners' claim. Rather, the court held that a variance procedure was available under Texas law and under local ordinance by which Petitioners could obtain relief from the PMD regulations. This holding, which is based entirely on state law, must be given great respect by this Court. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 n.8 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6, 262 (1980). In the complete absence of a variance request and any development application, the court refused to entertain Petitioners' arguments that the El Paso Zoning Board of Adjustment could not grant a variance in harmony with the PMD Ordinance, stating:

> There is then, a question of degree in determining whether a particular variance would violate the spirit of the zoning laws. Some number of density of lots over eleven may or may not [be authorized], and that must be determined by the

> zoning board of adjustment acting within its guidelines. After this degree is attained, the degree of taking can be arrived at. These degrees not only affect whether there is a taking but are relevant to the market value of the property for the purposes of establishing damages, if there is a taking.

City of El Paso, 803 S.W.2d at 401.

As recognized by the Texas Court of Appeals, this fact pattern is precisely the reason why federal courts fashioned ripeness requirements for regulatory taking claims. The facts in this case present familiar ground, which this Court and the lower courts have considered and mandated that a development application and attempts to obtain administrative relief from otherwise harsh impacts are necessary prerequisites to review of claims based upon the Just Compensation Clause of the Fifth Amendment.

IV. EVEN IF THE COURT OF APPEALS REACHED THE FEDERAL RIPENESS QUESTION, IT CORRECTLY RULED THAT RIPENESS IN THE CONTEXT OF AN AS APPLIED REGULATORY TAKING CLAIM IS JURISDICTIONAL UNDER FEDERAL LAW. NO TAKING CLAIM ACCRUES UNTIL RIPENESS REQUIREMENTS ARE SATISFIED.

A. Ripeness goes to Article III case or controversy.

This Court has unequivocally held that a development application and a request for a variance or other

form of administrative relief normally are essential prerequisites to judicial review of an as applied regulatory taking claim premised on the Fifth Amendment of the United States Constitution. *MacDonald*, 477 U.S. at 351; *Williamson County*, 473 U.S. at 194; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Agins*, 447 U.S. at 261. The Court also has determined that there can be no as applied regulatory taking claim as long as there is a "reasonable, certain and adequate provision for obtaining compensation at the time of the taking." *Williamson County*, 473 U.S. at 194.

It is undeniable that Article III requires a plaintiff to present a ripe controversy. *O'Shea v. Littleton*, 414 U.S. 488 (1974). In *Agins*, plaintiff's failure to submit a development application under the zoning ordinance in question left plaintiff's as applied takings challenge premature for lack of a "concrete controversy." 447 U.S. at 260. In *Williamson County*, plaintiff's failure to seek a variance left it "impossible for the jury to find, on this record, whether respondent 'will be unable to derive economic benefit' from the land." 473 U.S. at 172. Moreover, the Court determined that until a landowner seeks compensation through state procedures, it cannot be said that the state has violated the Just Compensation Clause of the Fifth Amendment: "Thus, the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " 473 U.S. at 172. *See also Preseault v. Interstate Commerce Comm'n*, 110 S. Ct. 914 (1990); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (taking claim against the Federal Government premature until landowner has sought compensation under the Tucker Act).

In *MacDonald*, the Court explained:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

477 U.S. at 348.

Likewise, in *Hodel*, the Court found plaintiff's takings challenge unripe because it had failed to utilize the administrative remedies available to obtain relief from the operation of the statute in question and because plaintiffs had failed to identify "any property in which appellees have an interest that has allegedly been taken by operation of the Act." 452 U.S. at 294. Given these facts, the Court concluded that the case "presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land." 452 U.S. at 295. *See also Pennell v. City of San Jose*, 485 U.S. 1 (1988).

A synthesis of these opinions plainly shows that the Court rejected the takings claim in these cases because the plaintiffs were unable to demonstrate that they had been injured in fact by the local government. In other words, absent a final decision from the local government and an unsuccessful attempt to gain administrative relief therefrom, it is impossible to say that there has been a taking, *i.e.*, an injury redressable under the Fifth Amendment. And, until a landowner has unsuccessfully sought compensation through state courts, the property owner

cannot as a matter of law claim a violation of the Fifth Amendment; no such violation has occurred at that point. In sum, until the requirements of *Agins*, *MacDonald* and *Williamson County* are satisfied, as a matter of law a landowner cannot demonstrate that his Fifth Amendment rights have been violated.

Petitioners would have the Court hold that the mere legislative enactment of a zoning ordinance renders the controversy concrete as to the regulation's economic impact on the landowner's use of the property. This proposition was fully explored and rejected in *Williamson County*, *MacDonald* and *Keystone Bituminous*, and does not require reexamination in this case.

Such a view is totally inconsistent with the nature of the development process. Zoning constitutes only the initial step in development of property and, hence, realization of economic return. The nature of the use and the intensity of development on the property cannot be determined until an application for a development permit of some kind has been acted upon. Hence, the Court's requirement that a development application be submitted pursuant to the allegedly offending zoning regulations goes to the concreteness of the controversy, not to prudential considerations. Further, under all state zoning enabling acts, a variance procedure has been incorporated in the very fabric of the authorization for zoning. A variance is not an extraordinary remedy, but is part and parcel of the process of deciding the permissible use and intensity of use of land.

This Court's rulings on finality precisely apprehend the nature of the development process under local zoning

laws. As this Court long has recognized, regulatory takings are fundamentally different from physical takings, in that the police power actions of local governments constitute only a restraint on the use of the property consistent with the notion of "reciprocity of advantage." *Keystone*, 480 U.S. at 488-93. This Court has ruled that a property owner must at least proceed through the normal development process before the effect of the actions of local government officials can be ascertained. Such a standard goes directly to the case or controversy requirement under Article III.

The Texas Court of Appeals followed this reasoning, stating:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

City of El Paso, 803 S.W.2d at 400.

Nor is there any reason to examine the application by lower federal courts of this Court's ripeness guidelines. The circuits consistently and correctly hold that ripeness goes to subject matter jurisdiction. *See, e.g., Biddison v. City of Chicago*, 921 F.2d 724, 726 (7th Cir. 1991); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990).

B. The decision in *First English* had no effect on jurisdictional prerequisites of a taking claim.

Petitioners assert that the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), impliedly overruled this Court's decisions on ripeness issues. Petitioners argue that the Court's ruling on the availability of compensation for temporary regulatory taking claims affected its previous rulings on ripeness, necessitating further clarification by this Court.

The *First English* decision addressed only the question of the availability of compensation in the event that a regulatory taking under the Fifth Amendment is actually found. The decision presumed that a taking already had occurred, due to the unique posture of the case, and did not question whether the controversy was ripe for review. 482 U.S. at 311-13. *First English* neither abrogates nor in any way alters the Court's previous decisions on ripeness and has no bearing on this case.

C. If an Article III case or controversy does not exist, prudential considerations are irrelevant.

Petitioners argue that the Texas Court of Appeals, together with many other lower federal and state courts, have misapprehended the federal ripeness doctrine. In particular, Petitioners assert that the controlling case is *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), in which the Court held that the ripeness doctrine is

founded both on Article III case or controversy requirements and on certain prudential considerations. Petitioners falsely reason that reviewing courts are required to examine prudential factors, such as the relative hardship to the parties, in every ripeness claim.

It is ironic that Petitioners claim that the ripeness of their claim should be evaluated under the prudential considerations of *Abbott Laboratories* instead of the case or controversy requirement of Article III, because these prudential considerations enlarge the grounds for dismissing cases. *See Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) ("This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)."); *Poe v. Ullman*, 367 U.S. 497, 502 (1961) ("The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution . . . is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1935) (Brandeis, J., concurring) ("The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."); *Molins PLC v. Quigg*, 837 F.2d 1064, 1068 (Fed. Cir. 1988) ("A case or controversy may be constitutionally ripe for review but that does not automatically invoke review. Prudential considerations must also be satisfied.").

No amount of prudential considerations can ever expand the subject matter jurisdiction of federal courts to render advisory opinions where Article III case or controversy requirements are not met. The Texas Court of Appeals unequivocally ruled that in the context of an as applied regulatory taking claim ripeness goes to the subject matter jurisdiction of the case. Consequently, prudential considerations have no bearing on whether the court has jurisdiction.

V. THERE IS NO CONFLICT BETWEEN FEDERAL RIPENESS RULINGS AND EXHAUSTION OF REMEDIES DOCTRINE.

Petitioners assert that the Court must clarify the relationship between exhaustion of administrative remedies and ripeness in the context of taking claims, due to confusion by lower courts in applying those doctrines. In *Williamson County*, the Court instructed that satisfaction of ripeness principles was a necessary prerequisite to consideration of as applied regulatory taking claims, but that exhaustion of administrative remedies was not. The Court clearly established that the requirements of a development application and petition for variance fell within the ripeness doctrine, not under the exhaustion of administrative remedies doctrine.[3] 473 U.S. at 192-94.

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[3] It is immaterial, of course, whether state courts classify such requirements as components of ripeness or exhaustion of administrative remedies; it is not the label, but the availability of alternative sources of relief, which determines whether a court should exercise jurisdiction over the controversy.

The difference between these doctrines, as exhaustively explored in *Williamson County*, grows out of the Court's rulings that exhaustion of administrative remedies is not a prerequisite to bringing a Section 1983 claim. In the context of civil rights claims, the exhaustion of remedies doctrine generally applies to agency procedures which challenge the validity of a final decision by the agency after the unconstitutional deprivation has already occurred. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). As stated in *Williamson County*, "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if a decision is found to be unlawful or otherwise inappropriate." 473 U.S. at 193.

The variance procedure, classified as an element of the ripeness doctrine in *Williamson County*, is not a procedure to evaluate the validity of zoning regulations or to appeal zoning decisions. To the contrary, the variance procedure is part and parcel of the normal statutory scheme for determining the type and intensity of use permitted on property in the face of alleged hardship to the applicant. Thus variance, special use and rezoning applications are necessary to determine the ultimate economic impact and the character of the regulation – two of the "essentially ad hoc, factual inquiries" that make up takings analysis. *MacDonald*, 473 U.S. at 349.

The guidelines established in *Williamson County* for differentiating between procedures which fall under the ripeness doctrine and those which fall under the exhaustion of remedies doctrine are clear. Lower courts have no

problems applying such procedures. This case presents no occasion for reconsidering the guidelines.

VI. THIS CASE PRESENTS NO OCCASION FOR THE SUPREME COURT TO RECONSIDER THE FUTILITY EXCEPTION TO THE RIPENESS DOCTRINE ANNOUNCED IN *MACDONALD*.

Petitioners assert that this Court should reexamine and clarify its futility "exception" to ripeness requirements. In *McDonald*, this Court decided that, under extraordinary circumstances, the property owner could be excused from complying with ripeness requirements by demonstrating that it would be futile to proceed with a development application or variance request; bare allegations of futility would not, however, suffice to establish futility.

The Court of Appeals correctly disposed of Petitioners' contentions that development applications and variance requests were futile due to statements of particular legislators about the enactment of the PMD regulations. Under both state and federal law, the subjective intent of individual legislators is incompetent evidence by which to establish the intent of the City in the enactment of land use regulations. *Regan v. Wald*, 468 U.S. 222 (1984); *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284 (Tex. Ct. App. 1989).

The state court conclusively determined that the variance remedy was available in order to obtain relief from the allegedly harsh effects of local zoning regulations. The decision of the Texas Court of Appeals as to the availability of the local remedy is one purely of state law not subject to review by this Court.

Contrary to Petitioners' assertions, lower courts have followed the Court's outline of the futility exception in formulating reasonable rules for determining whether a property owner should be excused from finality requirements. It is true, as Petitioners assert, that some courts have found that futility simply may not be established in the absence of at least one development application. This logic is premised upon the same reasoning that underlies the ripeness doctrine: avoidance of premature speculation on the type and extent of development that would be allowed under local regulations.

Lower courts have established futility exceptions on a number of grounds, including (1) unavailability of variance procedure (*Beure-Co. v. United States*, 16 Cl. Ct. 42 (1988); *Formanek v. United States*, 18 Cl. Ct. 785 (1989)); (2) ground for denial of application was not compatible with subsequent development application (*Ciampetti v. United States*, 18 Cl. Ct. 548 (1989)); (3) submission of multiple applications unnecessary (*de St. Aubin v. Flacke*, 68 N.Y.2d 66, 505 N.Y.S.2d 859, 496 N.E.2d 879 (1986)); (4) legislative action such as enactment of a moratorium precluded the proposed use of the property (*Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987)); and (5) rezoning of property precluded use for which development application was filed (*Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989)). None of these situations is even remotely present in this case.

CONCLUSION

The Texas Court of Appeals disposed of Petitioners' taking claim on state constitutional grounds. Because a

state constitutional remedy exists, a federal claim has not matured. Petitioners are free to pursue the compensation remedy under the Texas Constitution by taking the two steps necessary under state law to perfect their as applied taking claim: (1) submitting a development application under the challenged regulations; and (2) seeking a variance.

Even if the Court of Appeals reached the federal ripeness issue, the court correctly applied federal law. This case presents no extraordinary facts which would form the basis for a different direction in federal jurisprudence on the taking question. Nor have Petitioners pointed out any conflict among federal circuits in applying the ripeness doctrine outlined by this Court over the last decade. In fact, Petitioners concede that both federal and state lower courts uniformly apply ripeness principles to dispose of premature as applied taking claims, although the result is not to the Petitioners' liking. Petitioners have presented no grounds for review of the decision of the Texas Court of Appeals.

For these reasons, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MADERO DEVELOPMENT AND CONSTRUCTION COMPANY, INC., a Texas Corporation, and CHAPARRAL EQUITY CORPORATION, a Texas Corporation,	)	No. EP-86-CA-403
Plaintiffs,	)	
v.	)	
CITY OF EL PASO, TEXAS, a Municipal Corporation, and CITY PLAN COMMISSION,	)	
Defendants.	)	

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

This is an action for damages and other relief under 42 U.S.C. §§ 1983 and 1985 and the Fourteenth Amendment to the Constitution of the United States. The Plaintiffs also ask the Court to accept pendent jurisdiction over a claim pursuant to Article 1, § 17, of the Texas Constitution. Both parties have filed motions for summary judgment. The Defendants have also filed a motion for leave to file an amended answer, which the Plaintiffs oppose.

The facts are relatively undisputed. In 1979, Chaparral Equity Corporation, one of the Plaintiffs herein, sold a thirty-acre tract of land to one Rogelio Madero. Madero later conveyed the land to the other Plaintiff, Madero

Development and Construction Company, Inc. In September, 1980, Madero Development filed an application with the City for preliminary approval of a 1.8 acre subdivision to be built on the same tract of land, now known as "Madero Hills". Madero Development also requested a change of zoning from the City Plan Commission. The Commission deferred decision on the subdivision application and requested that Madero submit a master plan for the entire Madero Hills development. The Commission also denied the request of Madero Development for a zoning change from R-3/R-4 (high density residential) to SD (a special zoning category), recommending instead that Madero Hills be rezoned RMD (residential mountain district), a zoning classification that severely limited development. In December, 1984, the El Paso City Council passed an ordinance amending the RMD ordinance and changing its name to PMD (planned mountain district), a zoning classification with similarly strict limitations on development. In January, 1986, the City Council rezoned the Madero Hills property from R-3/R-4 to PMD. Under PMD zoning, the allowable density of development on a tract of land is tied to its percentage of slope. According to the City's method of calculation, the Madero Hills property had a slope of forty-eight percent. Therefore, under this zoning classification only twelve units could be built on the property, compared with 179 units under the previous R-3/R-4 zoning classification. The Plaintiffs have not sought a variance or special exception from the City Plan Commission or the Zoning Board of Adjustment to enable the property to be developed as previously planned, nor has either Plaintiff formally requested that the City Plan Commission or the City Council rezone

the property. Instead, they brought this action claiming that the Defendants have taken their property without just compensation and have denied them due process of law and equal protection of the law. They have filed a motion for summary judgment with respect to these claims. The Defendants have filed a motion for leave to file an amended answer, which the Plaintiffs oppose. The Defendants also seek summary judgment in their favor, contending that (1) Plaintiffs' claims are not ripe for review in federal court; (2) that the Plaintiffs lack standing to protest the City's zoning of the property, and (3) that even if the question were ripe and the Plaintiffs did have standing, they have not shown that the City's action constitutes a deprivation of their constitutional rights.

The Defendants' answer was filed on December 22, 1986. Paragraph 4 of that original answer read in its entirety as follows:

> Defendants [sic] admit the first sentence of paragraph Four of County I of Plaintiffs' Original Petition.[1] Defendants admit the remaining allegations of paragraph Four of Count I of Plaintiffs' Original Petition.

The Defendants claim that the second "admit" in this paragraph was a clerical error; it should have read "denied". They move to amend the answer to clear this up. The Court finds that leave to amend should be granted. It is well settled that leave to amend pleadings should be "freely given when justice so requires". Rule

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[1] The Plaintiffs labeled their pleading a "Petition" instead of a complaint as prescribed by Rule 3, Federal Rules of Civil Procedure.

15(a), Federal Rules of Civil Procedure. It is obvious from the history of this case that the "admission" was a clerical error which did not reflect the position of the Defendants. Furthermore, it must have been obvious to the Plaintiffs from the beginning that the Defendants' "admission" was unintentional. The parties pursued extensive discovery for over a year, and no one could have doubted that the merits of this case were being hotly contested, nor have believed that the Defendants intended to concede that their zoning action was "an arbitrary, unreasonable, exclusionary, and illegal act by the municipality" (Plaintiffs' Original Petition, paragraph Four, page 3). Furthermore, the parties have filed a joint pretrial order which was approved by the Court. The pretrial order clearly sets forth the Defendants' denial that the City's zoning actions on the Madero Hills property violated any of Plaintiffs, constitutional rights. A properly approved pretrial order supersedes all previous pleadings in the case. Defendants' motion for leave to amend should be granted, therefore, because it would bring the pleadings in line with the parties' common understanding of the contested issues in the case.

The Defendants have moved for summary judgment in their favor with respect to the Plaintiffs' claims under Section 1983, contending that the case is not ripe for review because the Plaintiffs have failed to obtain a final decision on the zoning in question. Of course, the exhaustion of administrative remedies is not a prerequisite to a suit under Section 1983. *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Nevertheless, an administrative action must be final before it is judicially reviewable.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985). An action is not "final" unless the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra* at 193-94. Furthermore, when a party alleges that his property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments, he must show that he has pursued the recovery of just compensation in the state courts and that recovery has been denied. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra,* at 195-96. The Constitution does not require that taking and compensation be simultaneous; it only requires a reasonable, certain and adequate provision for obtaining compensation. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra* at 195; *Regional Rail Reorganization Act cases,* 419 U.S. 102, 124-25 (1974); *Cherokee Nation v. Southern Kansas Railroad Co.,* 135 U.S. 641, 659 (1890). Like the instant case, *Williamson County* involved claims under both the Due Process Clause and the Just Compensation Clause, and the Supreme Court held that both were premature.

Plaintiffs argue that the instant case is distinguishable from *Williamson County,* because that holding was dependent upon the existence of procedures under state and local law for seeking an exemption from the zoning ordinance. They contend that the Defendants in this case have failed to show the availability of variances or special exemptions which would provide relief from the density restrictions of the PMD zoning. With respect to the claim

under the Just Compensation Clause, the Plaintiffs deny the existence of an "inverse condemnation" action in Texas comparable to the one in Tennessee upon which the Supreme Court relied.

With respect to the finality question, it is unclear under Texas law as to whether the Madero Hills zoning decision is "final". Under the El Paso City Code, the Zoning Board of Adjustment has authority to hear appeals and applications for variances and special exceptions. *El Paso City Code*, § 20.04.050. Furthermore, the City Code provides that "the board shall have the powers granted by, and be controlled by, Article 1101g, Rev. Civ. Stat. of Texas, as amended." The statute to which the City Code refers has been codified in the Texas Local Government Code. It provides in pertinent part:

> The governing body [the City Council] may authorize the Board of Adjustment, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance.

Texas Local Government Code, § 211.008(a) (Vernon 1988). Boards of adjustment are also empowered to grant variances from the terms of zoning ordinances:

> [I]f the ordinance is not contrary to the public interest, and due to a special condition, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.

Texas Local Government Code, § 211.009(3) (Vernon 1988). Furthermore, the Code provides that a decision of the Zoning Board of Adjustment may be reviewed by a state district court. In the instant case, there is no indication that the Plaintiffs have sought a variance from the Zoning Board of Adjustment, the City Plan Commission, or the City Council. Although the Plaintiffs suggest that such a request would have been futile, they have cited no case law in support of a "futility" exception to the ripeness and finality requirement imposed by the Supreme Court.

Even if the availability of relief from the Zoning Board of Adjustment is uncertain, the Plaintiffs clearly had the right to seek relief in state court. Texas law recognizes a judicial remedy for a property owner aggrieved by an arbitrary and unreasonable zoning action by a city. *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971); *City of Austin v. Nelson*, 45 S.W.2d 692 (Tex. Civ. App. – Austin 1931, no writ). Property owners also have recourse to the Texas courts if a zoning board of adjustment arbitrarily grants or denies variances that restrict the use of or affect their property. *Board of Adjustment v. Willie*, 511 S.W.2d 591 (Tex.Civ.App. – San Antonio 1974, writ ref'd n.r.e.); *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727 (Tex.Civ.App. – Dallas 1968, writ dsm'd w.o.j.), *cert denied*, 396 U.S. 277 (1970).

The Plaintiffs challenge the continuing viability of the *Williamson County* ripeness requirement in light of the Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,

___ U.S. ___, 107 S.Ct. 2378 (1987). The Court finds that holding not inconsistent with *Williamson County*. In *First English Evangelical Lutheran Church*, the plaintiff had alleged a taking without just compensation and had filed suit in California state court. The matter had been litigated all the way to the Supreme Court of California, and came to the United States Supreme Court by means of direct appeal. Surely the ripeness requirement was satisfied in that case, whereas in the instant case it has not been satisfied. The Plaintiffs must take their grievance to state court and seek just compensation for the alleged "taking" before bringing suit in this Court under Section 1983.

Finally, the Plaintiffs have failed to state a claim for relief under 42 U.S.C. § 1985(3). The statute now codified as 42 U.S.C. § 1985(3) was originally enacted by Congress as part of the Ku Klux Klan Act of 1871. Its purpose was to protect emancipated blacks and their supporters from conspiracies to deprive them of their civil rights. *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 835-37 (1983). In order to state a claim under Section 1985(3), the plaintiff's complaint must allege a conspiracy motivated by race-based invidiously discriminatory animus. *United Brotherhood of Carpenters and Joiners v. Scott, supra; Griffin v. Breckenridge*, 403 U.S. 88 (1971). No such allegations are made in the instant case, and no claim under Section 1985(3) has been stated.

In light of the foregoing discussion, the following orders should be entered.

It is ORDERED that the Defendants' motion for leave to file and amended answer in the above-styled and

numbered cause be, and it is hereby, GRANTED. The District Clerk is directed to file the first amended answer.

It is further ORDERED that the Defendants' motion for summary judgment be, and it is hereby, GRANTED.

It is further ORDERED that the Plaintiffs' claim for relief under 42 U.S.C. § 1983 be, and it is hereby, DISMISSED without prejudice.

It is further ORDERED that the Plaintiffs' claim under 42 U.S.C. § 1985(3) be, and it is hereby, DISMISSED with prejudice.

SIGNED AND ENTERED this 21st day of December, 1988.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE